

### **REMARKS**

The Examiner is thanked for the allowance of claims 28-29. The remaining claims, however, continue to be rejected. Regrettably, the Examiner has not accepted the truthful statements set forth in Applicant's previous declaration under 37 CFR 1.131. While the inventors have declared that they conceived the present invention (as claimed) prior to the filing date of the principal reference (*Boer et al.* - U.S. Pub. No. 2004/0101035, hereinafter "*Boer*") the Office Action has refused to accept the 131 declaration. In this regard, the FINAL Office Action, and ensuing Advisory Action, argued that an unexplained period of one month (October 28, 2002 through November 27, 2002) constituted a failure to show diligence. However, the Office Action offered no explanation as to what WOULD constitute diligence.

As pointed out by the undersigned in the response to FINAL Office Action, the position taken by the Examiner ignores business realities (i.e., that employees of any business have multiple responsibilities). As an example, the undersigned pointed out that the FINAL Office Action in this very application was mailed June 10, 2009, or approximately three months from the date in which Applicants filed the last response (March 11, 2009). That is, there were three months of inactivity by the Examiner in this application. Notwithstanding, Applicants did not question the Examiner's diligence in issuing the FINAL Office Action. The Examiner did not respond to this argument, apparently agreeing with it. Accordingly, as claims have been allowed in this application, Applicant assumes that the patent term will be extended an appropriate period of time, as a consequence of the Patent Office not diligently prosecuting this application.

Despite Applicant's continued disagreement with the rejections, Applicant has elected to cancel the rejected claims in order to advance this application to issuance. Applicant has made certain cosmetic (non-substantive) amendments to allowed claims 28 and 29, and has added additional claims that depend from claims 28 and 29. As claims 28 and 29 are allowed, the added dependent claims should also be allowed.

New independent claim 39 is also added, and is fully supported by FIG. 5 (and the related disclosure) of the original application. Accordingly, the addition of claim 35 adds no new matter to the application. Simply stated, claim 35 defines over the cited art of record. In this regard, the cited art fails to disclose or suggest at least the features of: "increasing the first transmission rate, if the determining step determines that the first successful transmission ratio is larger than the second transmission ratio; and decreasing the first transmission rate, if the determining step determines that the first successful transmission ratio is not larger than the second transmission ratio."

New claims 40-43 depend from claim 39 and therefore define over the cited art for at least the same reasons. *In re Fine*, 837 F.2d 1071, 5 U.S.P.Q.2d 1596, 1600 (Fed. Cir. 1988).

### **CONCLUSION**

Applicants respectfully submit that all pending claims are in condition for allowance. Favorable reconsideration and allowance of the present application and all pending claims are hereby courteously requested. If, in the opinion of the Examiner, a

telephone conference would expedite the examination of this matter, the Examiner is invited to call the undersigned attorney at (770) 933-9500.

A credit card authorization is provided herewith to cover the fee associated with the accompanying RCE application and one-month extension of time. No additional fee is believed to be due in connection with this response to Office Action. If, however, any additional fee is believed to be due, you are hereby authorized to charge any such fee to deposit account No. 20-0778.

Respectfully submitted,

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